

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>DAVID FOSTER</b>	:	DETERMINATION
	:	DTA NO. 819491
for Revision of a Determination or for Refund of Cigarette	:	
Tax under Article 20 of the Tax Law for the Period Ended	:	
February 13, 2002.	:	

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Petitioner, David Foster, 212 N. Main Street, Oneida, New York 13421, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period ended February 13, 2002.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 333 East Washington Street, Syracuse, New York on October 22, 2003 at 9:15 A.M. Petitioner appeared by James J. Devine, Jr., Esq. The Division of Taxation appeared by Mark F. Volk, Esq. (John Walther).

Since neither party herein elected to reserve time for the submission of post-hearing briefs, the three-month period for the issuance of this determination commenced as of the date the small claims hearing was held.

***ISSUE***

Whether the Division of Taxation properly determined that petitioner was liable for a penalty of \$3,500.00 imposed pursuant to Tax Law § 480-a(3)(a) for failure to possess a valid New York State Certificate of Registration for the retail sales of cigarette or tobacco products for the 2002 calendar year.

***FINDINGS OF FACT***

1. Petitioner herein, David Foster, owns and operates as a sole proprietor a small convenience store known as Dave's Market in Oneida, New York. Oneida, New York is a small

city of approximately 11,000 residents located in the central part of the State almost midway between the cities of Utica and Syracuse.

2. On February 13, 2002, an investigator from the Division of Taxation's ("Division") Office of Tax Enforcement conducted a regulatory inspection of petitioner's premises. Said inspection revealed that petitioner's entire inventory of cigarettes, consisting of approximately 20 to 25 cartons, contained the proper cigarette tax stamps. However, the investigator could not find any record of petitioner's having a valid Certificate of Registration as a retail dealer of cigarettes for the 2002 calendar year. Shortly after the regulatory inspection, petitioner submitted to the Division an application to be registered as a retail dealer of cigarettes and tobacco products along with a check for \$100.00, which amount represents the cost of the registration. The Division issued a Certificate of Registration to petitioner on February 28, 2002.

3. On July 18, 2002, the Division issued a Notice of Determination to petitioner asserting that a penalty in the amount of \$3,500.00 was due for the period ended February 13, 2002. The notice advised petitioner as follows:

During an inspection of your premises, on 02/13/02, you were found to be in violation for failure to possess a valid New York State certificate of registration for retail sales of cigarettes and/or tobacco products.

Therefore, a civil fine is imposed under Article 20 of the New York State Tax Law.

4. Dave's Market is engaged in business as a grocery store, meat market, bike shop and sharpening service, and petitioner has owned and operated the business since 1967. Petitioner lives in an apartment located above the market and, while he does on occasion hire part-time help, he is the only full-time employee. The business is open seven days a week from 9:00 A.M. to 9:00 P.M.

5. The Division has performed three regulatory inspections on petitioner. The first one occurred on June 27, 1996, and at that time petitioner was found to be possession of 4.7 cartons of unstamped cigarettes. The unstamped cigarettes were seized and petitioner was cited for violation of Tax Law § 1814(a)(1), attempt to evade or defeat the tax, and Tax Law § 1814(d),

possession of unstamped cigarettes. Petitioner was issued two appearance tickets to appear in Oneida City Court where he pled guilty to disorderly conduct and was fined \$250.00. No civil penalty was assessed by the Division since Tax Law former § 481(b) provided for a civil penalty only when more than 10 cartons of unstamped cigarettes were discovered.

Petitioner was again inspected on March 29, 1999 and, while no unstamped cigarettes were found, petitioner did not have a valid Certificate of Registration on file. The Division issued an assessment to petitioner asserting that a penalty of \$1,000.00 was due for his failure to have a valid Certificate of Registration. The penalty was later reduced to \$200.00, which amount petitioner paid. The third inspection occurred on February 13, 2002 and is the subject of this proceeding.

6. A retail dealer of cigarettes is required to obtain from the Division on or before January 1 of each year a Certificate of Registration. For the eight-year period 1996 to 2003, petitioner obtained the required Certificate of Registration on or before the January 1 deadline on only two occasions, 1998 and 2003. For the remaining six years, petitioner obtained certificates of registration, however, the certificates were not acquired on or before the prescribed due date.

7. Petitioner did not intentionally and knowingly fail to timely obtain the Certificate of Registration; he essentially forgot to renew the registration. As noted earlier, petitioner runs the business by himself working between 80 and 90 hours per week, and paperwork sometimes is put off because of the press of other business matters. Further complicating matters was the fact that petitioner's spouse became ill in the fall of 1993 and subsequently died some three and one-half years later on March 3, 1997. Her illness and subsequent death put a great strain on petitioner.

8. Petitioner maintains a very small inventory of cigarettes and on a weekly basis he sells only 50 to 60 packs of cigarettes. Dave's Market is located in close proximity to nine or ten Oneida Indian Nation outlets where cigarettes are sold tax free and therefore petitioner cannot offer a competitive price on cigarettes. Petitioner sells cigarettes solely as a convenience to his

customers and he makes little profit from these sales. Cigarette sales constitute a very small percentage of petitioner's overall sales.

### ***SUMMARY OF PETITIONER'S POSITION***

9. Petitioner argues that his failure to timely register for 2002 was unintentional. Petitioner notes that he immediately filed for the Certificate of Registration as soon as he became aware that he had neglected to do so and that he has always met his other tax obligations in a timely fashion. Petitioner asserts that the penalty at issue herein, computed at the maximum rate, imposes a financial hardship given that (a) he is a one-man operation with limited resources; (b) cigarette sales represent an extremely small percentage of gross receipts; (c) the last two inspections uncovered no untaxed cigarettes or noted any other violations; (d) his failure to file timely for the 2002 Certificate of Registration was essentially a harmless mistake which merely deprived the State of the \$100.00 fee for some 59 days; and (e) the penalty at issue, \$3,500.00, is grossly disproportionate to the nature of the offense. Petitioner maintains that in the grand scheme of things the offense he committed was insignificant and that no one was injured, no one was threatened and no one was cheated.

### ***CONCLUSIONS OF LAW***

A. In the instant matter there is no dispute that petitioner is a retail dealer of cigarettes and tobacco products as defined in Article 20 of the Tax Law and, as such, is required to obtain and publicly display a Certificate of Registration pursuant to Tax Law § 480-a(1)(a). Tax Law § 480-a(1)(c) provides that the Certificate of Registration is "valid for a calendar year" and "must be renewed each year."

B. Tax Law § 480-a(3)(a) imposes a civil fine upon a retail dealer who fails to obtain a Certificate of Registration. Prior to November 14, 2000 the fine for the first violation was "not to exceed one thousand dollars. . . ." Effective November 14, 2000 the statute was amended and provided that for a second or subsequent violation within three years following a prior finding of violation the retail dealer was "liable for a civil fine not less than one thousand dollars but not to

exceed three thousand five hundred dollars.” Since the violation at issue herein occurred on February 13, 2002, a date within three years of the March 29, 1999 violation, the Division asserted the maximum penalty of \$3,500.00 for said second violation.

C. Petitioner concedes that he did in fact commit two violations of the provisions of Article 20 of the Tax Law; however, he argues that the violations were minor and unintentional and that the \$3,500.00 maximum penalty imposed should be canceled or reduced. After careful examination of the entire record herein, I believe that it is fair and equitable (Tax Law § 2012) to reduce the penalty asserted herein from \$3,500.00 to the \$1,000.00 minimum provided for by statute.

D. The petition of David Foster is granted to the extent provided for in Conclusion of Law “C”; the Division is directed to modify the Notice of Determination dated July 18, 2002 so as to be consistent with the determination issued herein; and, except as so granted, the petition is in all other respects denied.

DATED: Troy, New York  
December 18, 2003

/s/ James Hoefer  
PRESIDING OFFICER